No. 15,251

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW BING KEW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S REPLY BRIEF.

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I.

THE FIRST COUNT.

Appellee's argument in substance is that the trial Court did not rest its judgment solely on the "carelessness" of appellant, and that the trial Court must be presumed to have properly applied the law. Appellee also contends that there were circumstances from which the trial Court could have found that the representation referred to in Count One was intentionally made.

The statute (18 *U.S.C.*, Section 911) punishes false representations only when "wilfully" made. The de-

fense was that appellant signed the license application without reading it and was unaware of its contents. The trial Court based its judgment (T. 14-15) upon "the findings of fact and conclusions of law contained in the ruling on motions for judgment of acquittal." Those findings and conclusions on the issue now under discussion are as follows:

> "Defendant testified that he signed the application for a liquor license without reading it because it was his practice to sign any such document presented to him by his employees or by his attorney. This glib accused who described himself as the president of several corporations operating supermarkets as well as engaged in the business of 'General merchant, grocery store, meat market, furniture store, drug store, department store, cattle business, rancher, and Northwestern Development Company, uranium business, farmer' and who has amassed a fortune of half a million dollars while so engaged, is in no position to relieve himself of criminal responsibility because of claimed ignorance. On the contrary, his brash carelessness, if such be the case, emphasizes his criminality." (T. 8).

Since it is an essential element of the offense charged that it be "wilfully" done, the foregoing statement, if given to a jury as an instruction, would unquestionably have constituted fatal error (e.g. *Bloch v. United States,* 221 F. 2d 786, Rehearing denied 223 F. 2d 297). True, there was no jury in the case at bar. However, a Court as well as a jury may apply an erroneous rule of law. We cannot read the foregoing ruling of the trial Court as meaning any-

thing but that if the defendant signed the document without reading it, he was brashly careless and in that event his ignorance of its contents would not constitute a defense. If the Court applied such a rule of law, it seems clear, under the authorities cited in appellant's opening brief, that the judgment of conviction on Count One cannot be sustained. A Court may not "enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute" (*Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). Here one of the components contemplated by the words of the statute is that the representation be "wilfully" made. Carelessness, therefore, is not enough to constitute the offense (*Bloch v. United States,* supra).

A consideration of the present record shows rather clearly that the trial Court concluded, not that the representation was intentionally made, but that, if the document was signed under the circumstances disclosed by the evidence, appellant's ignorance of its contents would be no defense. This seems evident, not only from the language of the Court in its finding quoted above, but from the evidence with respect to the particular document (T. 30) which was involved. It is unquestionable that the document was prepared in the office of the Board of Equalization at Martinez, California by a clerk in the Board's office, from data furnished to her by the witness, Helton, who was Supervisor of the various stores operated by appellant's company. Appellant was not present when the

form was prepared, and did not participate in its preparation. The obtaining of necessary licenses for the various stores was a part of the duties of the witness, Helton. The completed form was later presented to appellant at Stockton, California by witness Helton, and the testimony, both of witness Helton and of appellant, is that appellant did not read the form before signing it (T. 99-100, 101). Appellant is active in a large number of business enterprises (T. 110) and is called upon to sign several hundred business documents weekly, some of which he does not read before signing, depending on the nature of the document and by whom it has been prepared (T. 125). Such reliance upon an employee in matters of administrative detail is not at all uncommon in the business world, particularly where the matter is of a category for which the employee is primarily responsible.

Upon this state of the record, the question whether appellant knew when he signed the document that it contained the particular statement upon which Count One is based, was directly presented. The findings and conclusions of the trial Court are quoted above. We see no escape from the conclusion that the trial Court decided this issue on the theory that if the appellant signed the form without reading it, he was brashly careless and that such carelessness would amount to a wilful violation of 18 U.S.C. Section 1001.

Obviously, if the trial Court decided the issue under such a concept of the law, the trial Court ap-

plied an erroneous test of wulfulness, and the conviction cannot be sustained. We submit that it is clear from the record in this case that such an erroneous theory of law was applied by the Court below, and that for this reason, the conviction on count one must be reversed.

The cases of *Spies v. United States,* 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418, and *United States v. Murdoch,* 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381, cited in appellee's brief lend no support to appellee's argument. In both those cases convictions were reversed for failure of the trial Court to give proper instructions as to what constituted wilfulness. These decisions actually bear out appellant's contention that more than negligence is required to constitute a wilful violation. And if the trier of fact, whether Court or jury, has applied the erroneous theory that a wilful violation can be constituted from mere carelessness, then we submit, the conviction cannot stand. We think such a situation is presented in the case at bar.

Regarding appellee's contention that there were circumstances which could lead the trial Court to believe that the representation was wilful, we would point out that apparently the Court believed, not that wilfulness was present but that carelessness was enough. Moreover, under the circumstances shown with respect to the preparation and execution of the particular document referred to in Count One, it is far more probable that appellant did not read the document before signing it than that he did read it. The

evidence in this particular respect is at least as consistent with innocence as with guilt and would consequently not sustain the conviction (*Candler v. United States* (CA5), 146 F. 2d 424, 426).

If it be contended that the mere execution of the form by appellant gave rise to a presumption or inference that he knew its contents, and that the trial Court could have arrived at its judgment on that basis, the answer is quickly apparent. Such a presumption or inference "disappears when substantial evidence to the contrary is produced" (*Silverton v. Valley Transit Cement Co., Inc.* (CA9), 237 F. 2d 143, 144).

Although in a civil case presumptions may sometimes fix the burden of proof, they may not do so in a criminal case on the main issue; for there, on a plea of not guilty, the burden and quantum of proof to establish the corpus delicti and the defendant's guilt never shifts. To sustain conviction on circumstantial evidence, proof must not only be consistent with defendant's guilt but it must exclude every reasonable hypothesis of his innocence (*Ezzard v. United States* (CA8), 7 F. 2d 808).

An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence, which is not open to doubt, even though such evidence is produced by the opposite party (*Engstrom v. Auburn Auto Sales Corp.,* 11 Cal. 2d 64).

> "It often is tempting to cast in terms of a 'presumption' a conclusion which a court thinks pro-

bable from given facts. * * * A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense."

Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288.

Appellee refers to the fact that the application for liquor license (T. 30) does not show the names of the other partners in the concern, as called for by the form. But that circumstance is not evidence that appellant knew its contents. The concern held a sales tax permit issued by the Board of Equalization which showed all the partners (T. 155), some of whom are citizens (T. 154-155), and the omission of the other names from this particular form is plainly without significance on the issue under discussion. Moreover, citizenship of the parties is relevant only where application is being made for an *On Sale* license (*Calif. Business and Professions Code,* Sec. 23788), and the fact that the form was incompletely filled out by those preparing it has no tendency to prove an intentional misrepresentation on appellant's part. Not only did he have no hand in preparing the form, but all the testimony regarding that document is that matters relative to obtaining licenses were among witness Helton's duties as Supervisor of the concern's various stores, and that appellant signed the form as presented to him by Helton without reading it.

Appellee argues that the trial Court could consider that in 1947 appellant had obtained a passport by claiming to be a citizen. But if on the occasion

charged in Count One of the indictment appellant unwittingly signed the document without knowledge of its contents, an incident far beyond the bar of the statute of limitations should not be thrown into the scales against him. We are not unmindful of the rule that under certain circumstances evidence of similar acts may be admitted to show intent. But here it appears that the trial Court in adjudging appellant guilty of the charge set forth in Count One of the indictment was laboring under a legal misconception, i. e. that carelessness was sufficient to establish guilt, a proposition which has been rejected by this Court (*Bloch v. United States, supra*). As a result the case was tried upon a fictitious issue, viz: the issue of carelessness, instead of the true issue of whether appellant "wilfully" committed the particular act charged. Appellant, we submit, is entitled to a trial on the true issue, regardless of what he may or may not have done on other occasions. If in fact he is not guilty of the offense charged in the indictment, he should not be caught in the backwash of an old misdeed.

Finally, appellee refers to evidence that appellant has taken out policies of life insurance showing his birthplace as Sacramento, California. In the situation here presented we submit that this is wholly without significance. Such a misstatement does not constitute a criminal offense (*Smiley v. United States,* (CA9) 181 F. (2d) 505, 506). Nor is the intimation justifiable that appellant thereby obtained insurance which otherwise might have been denied him. Such

extraneous matters would constitute little support for finding, in the face of the direct evidence to the contrary, that appellant signed the license application (T. 30) with full knowledge of its contents. In fact, it appears that the trial Court made no such finding, but believed that carelessly executing such a document without reading it was sufficient to constitute the offense charged. If the trial Court based its judgment on this erroneous legal premise, the end result is the same as though the error had occurred in a charge to a jury. In either case an erroneous legal standard has been applied in determining the guilt or innocence of the accused. We submit, therefore, that the conviction on this count was erroneous as a matter of law and should be reversed.

II.

THE SECOND COUNT.

(a) The Statement Charged Is Not Within the Purview of 18 U.S.C. Section 1001.

Appellee argues that wholly apart from 8 USC Section 1357 and the regulations cited in our opening brief (8 CFR Sections 242.11 and 242.12) immigration officers have a broader area of authority by virtue of 8 USC Section 1225 (a).

Appellee's argument proceeds upon erroneous premises. In the first place, the authority set forth in Section 1225 (a), supra, is expressed in language identical with Section 1357 (b). We quote the relevant portions of Section 1357:

"(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;"

* * * * * * *

"(b) Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code."

Moreover, it is provided elsewhere in the statute (8 USC Section 1103) that "the Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens," that "he shall have control, direction and supervision of all employees * * * of the Service" and that "he shall establish such regulations * * * as he deems necessary for

carrying out his authority under the provisions of this Act."

It is settled that regulations of the Department issued pursuant to the authority of the statute have the force and effect of law and are binding upon the immigration officers as well as upon the alien (*U.S. ex rel. Ohm v. Perkins* (CA2) 79 F. 2d 533, 534).

It is of the utmost significance that the statute in conferring the power to interrogate and administer oaths and take and consider evidence, specifically provides that "any person to whom such oath has been administered" who shall "give false evidence or swear to any false statement" shall be guilty of perjury and punishable for that offense (Section 1357(b), supra). Thus both the statute and the regulations appear clearly to contemplate something in the nature of formal interrogation and seem clearly to negative the proposition that informal conversations may be used as a basis for prosecuting an individual through the invocation of a separate "false statement" statute (such as 18 USC 1001).

> "Those charged with the enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment, to set aside any one of the rules on which the rights of aliens depend."
>
> *Sibray v. U.S. ex rel. Plichta* (CA3) 282 F. 795, 797-798.

It is impliedly conceded in appellee's brief that the purpose of Anderson's inquiry was concerned with the possibility of appellant's being subject to deporta-

tion. Indeed the interrogation could have no other purpose, since appellant was within the United States and was not seeking to enter, re-enter or pass through the United States, nor was he making any other type of application. The interrogation was plainly of a nature which Sections 242.11 and 242.12 of the regulations were designed to cover, since those sections expressly apply to investigations having for their purpose the discovery of whether or not a basis for the institution of deportation proceedings may exist.

If the interrogation was designed to elicit information as to whether the applicant might possibly be subject to a deportation proceeding, then any information thus obtained could not be used without compliance with the regulations (*Bridges v. Wixon,* 326 U.S. 135, 65 S. Ct. 1443, 89 L.Ed. 2103). If, on the other hand, this was not the purpose of Anderson's interrogation, it is impossible to see why the interrogation took place, since its only purpose could be to explore the possibility that the appellant was not entitled to "reside in" the United States, i.e. that he was subject to deportation.

It is clear that the statute and the regulations create a unified pattern of procedure in connection with the investigation and determination of matters arising under the Act. Careful provision is made to separate the investigative function from the function of decision. Careful provision has also been made in the regulations which we have cited to prescribe proper procedure for the taking of statements by investigative personnel for use by the Service.

That Anderson was not proceeding in accordance with the authority to "administer oaths and to take and consider evidence" is clear from the facts that he did not administer any oath, did not take or record any evidence and that any statement made to him under the circumstances could not have been considered as evidence in any subsequent proceeding to determine the appellant's rights or privileges (8 CFR 242.11; *Bridges v. Wixon,* supra.). That Anderson was not taking "evidence" at that time is also clear from the fact that, although he had in his possession the file covering the entry of one CHOW BING KEW as an alien in 1929 and the information which he had was to the effect that this file pertained to the entry of the appellant, he made no effort to resolve the issue by interrogating appellant as to whether he was the person who had arrived at that time.

The case of *United States v. Meyers,* 131 F.S. 525, cited by appellee, is not in point. That case involved execution by a Federal employee in his official capacity of a false declaration regarding a matter pertaining to his official duties.

Appellee attempts to distinguish the cases of *United States v. Levin,* 133 F.S. 88, and *United States v. Stark, et al.,* 131 F.S. 190, on the ground that those cases involved statements made to a "strictly investigative agency" which has no power of final disposition of the matters being investigated. Obviously, this is a distinction without a difference. Here the interrogation was in the nature of a casual, "exploratory search" on the part of an investigator

under circumstances whereby any information thus obtained could not have been considered in any proceeding by the agency to determine any issue within its jurisdiction. The contention that the Service "has authority to finally dispose of matters of citizenship or lack thereof" is meaningless. The Service has such authority only when such an issue is presented in a "matter" or proceeding within its jurisdiction, and arises in the course of an authorized procedure to determine that issue.

The reasonable interpretation of 18 USC Section 1001, is that it covers only statements made in some proceeding which is within the jurisdiction of the agency to decide, and which may have some bearing upon its decision. Certainly a statement which cannot be used or considered by the agency in its proceedings to determine the issue is not within the reasonable interpretation of Section 1001, supra.

The proper construction of a criminal statute in circumstances such as those here presented is illustrated by the decision of the Supreme Court in *Todd, et al., v. United States,* 158 U.S. 278, 15 S.Ct. 889. In that case the statute (R.S. Section 5406) punished any person who might injure a witness for having testified "to any matter pending" in a Court of the United States. It was held by the Supreme Court that injuring a witness who had testified in a preliminary examination before a Commissioner was not within the purview of the statute. In that case the Court said:

"While a preliminary examination may be, in the strictest sense of the term, a judicial proceeding, yet the language of the statute is not broad enough to include every judicial proceeding held under the laws of the United States."

The Court in that case also said:

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment and that no act, however wrongful, can be punished under such a statute, unless clearly within its terms. 'There can be no constructive offenses and, before a man can be punished, his case must be plainly and unmistakably within the statute' (citing authorities)."

In that case the Supreme Court cited with approval the earlier case of *United States v. Clark,* 1 Gall. 497, Fed. Cas. No. 14804, in which the indictment was for perjury on a preliminary examination before a Judge of the United States District Court under a statute which punished perjury "in any suit, controversy, matter or cause depending in any of the courts of the United States." In the *Clark* case, the Court said

"The statute does not punish every perjury but only a perjury done in a Court of the United States. Primarily, therefore, it is of the essence of the offense that it should be charged as committed in such court."

The conclusion was that perjury before a judge on a preliminary examination was not perjury in a

court of the United States within the meaning of those words in the criminal statute then under consideration.

We submit that in the case at bar a statement made in the course of a preliminary exploratory conversation with an investigator, which is not taken in accordance with the procedure prescribed to permit its use before the agency in subsequent proceedings is far from being "plainly and unmistakably within" 18 USC Section 1001, and is not one made *in* a "matter within the jurisdiction of" the agency within the meaning of that Section.

We would also point out that the wisdom and importance of the regulations covering the taking of statements in preliminary investigations regarding the right of an alien to be in the United States is well exemplified by the fact that when the investigator complied with the regulations in the case at bar, the result was a full disclosure by appellant which contained no untruth. It seems superfluous to point out that the regulations are designed not only to impress the person under interrogation that what he is about to say may become evidence in a subsequent proceeding, but to insure that there is no room for mistake or misapprehension either as to what is said or as to its importance. Here when the prescribed procedure was followed it immediately elicited the truth.

We have heretofore pointed out that the cases of *Cohen v. United States* (CA9) 201 F. 2d 386 and *Knowles v. United States* (CA10) 224 F. 2d 168,

upon which appellee relies, are clearly distinguishable, since those cases involved the formal submission of financial statements in a proceeding to determine the tax liability of the individual. The only cases arising under Section 1001, supra, which appear to have involved situations somewhat similar to that in the case at bar are the cases of *United States v. Levin,* supra, *United States v. Stark, et al.,* supra, and *United States v. Moore* (CA5) 185 F. 2d 92, all of which decisions hold that statements made in preliminary exploratory interviews of the nature here under discussion are not within the scope of Section 1001.

(b) The Sufficiency of the Indictment.

We have pointed out that the indictment alleges no more than that the statement was made to Anderson who was an investigator of the named agency and does not allege that it was made in a matter within the jurisdiction of that agency, nor that Anderson was acting in such a matter when it was made. The cases cited by appellee merely hold that if the indictment charges "all the essential elements" of the crime, defects in matters of form are to be disregarded. We have no quarrel with that well-settled principle. Our objection to the indictment goes not to a matter of form but a matter of substance, viz.: the omission to charge one of the essential elements of the offense. The cases cited in our opening brief hold that the omission from an indictment of a fact that constitutes an essential element of the crime intended to be charged is fatal. We submit that there was such a fatal omission in this instance in the failure to charge

that the statement was made in a matter within the jurisdiction of the agency, or at least that Anderson was acting in such a matter when the statement was made to him.

III.

CONCLUSION.

We submit as to Count One of the indictment that the court applied an erroneous rule of law in deciding the issue of wilful violation and that as to Count Two, neither the facts shown nor the facts pleaded constitute an offense within the purview of 18 USC Section 1001. We submit therefore that the judgment of the court below should be reversed.

Dated, February 15, 1957.

Respectfully submitted,

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